

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

02 OCT 18 PM 3 10

In Re: PETITION TO SUSPEND )  
BELLSOUTH TARIFF NO. TN2002-256 ) TN REGUL DOCKET NO. 02-01073  
AND TO CONVENE A CONTESTED CASE ) DOCKET ROOM  
PROCEEDING )

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**REPLY OF THE CLEC COALITION IN SUPPORT OF THE PETITION TO SUSPEND  
BELLSOUTH TARIFF NO. TN2002-256 AND TO CONVENE A CONTESTED CASE  
PROCEEDING**

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**INTRODUCTION**

This case involves issues which have never before been considered in Tennessee. For the first time, BellSouth Telecommunications, Inc. ("BellSouth") has proposed to charge one long distance carrier – Sprint – less than all other carriers for handling long distance calls. The CLEC Coalition has asked the Tennessee Regulatory Authority to conduct a hearing as to whether BellSouth's proposed tariff is "non-discriminatory" and "just and reasonable" as required by state law. The Consumer Advocate Division has joined in this request for a hearing. Such a hearing could be concluded within sixty days, as has been the practice of the Authority in handling expedited matters.

BellSouth, on the other hand, asks that this unprecedented tariff be allowed to go into effect automatically without any evidence, testimony, cross-examination, or, presumably, even an order of the Authority addressing the legal and regulatory issues raised by the Coalition and the Consumer Advocate. In response to the Coalition's request, BellSouth filed a ten-page "Answer" which focuses largely on federal law and FCC rulings while ignoring the Tennessee statutory requirements which this Authority is obliged to interpret and enforce. In brief reply to BellSouth, the Coalition submits the following:

## ARGUMENT

Since the inception of intrastate "access charges" in the 1980s, BellSouth has always charged all long distance carriers the same rates for originating and terminating long distance calls. This is consistent with Tennessee law which requires BellSouth to provide "non-discriminatory interconnection" to its network "under reasonable terms and conditions." T.C.A. § 65-4-124.

Now BellSouth proposes to charge different rates to different carriers based, not on any apparent cost differences, but on a carrier's ability to negotiate more favorable rates. In its "Answer" to the Petition, BellSouth has acknowledged its proposed tariff, called the "SWA [switched access] Pricing Flexibility Tariff," is specifically designed to benefit one long distance carrier, Sprint, and that the parameters of the tariff *ie.*, the size of the discounts and the amount of usage that would qualify for discounts, were developed in negotiations with Sprint. BellSouth Answer, at 4. Although BellSouth argues that the proposed discounts are available to "all" long distance carriers, BellSouth has acknowledged that only four carriers currently meet the minimum usage requirements in the tariff. Furthermore, as a practical matter, the restrictive, tightly drawn limits contained in the tariff make it highly likely that no carrier other than Sprint can take advantage of proposed discounts.<sup>1</sup> As the Coalition noted in its Petition, the usage and

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<sup>1</sup> The terms of the tariff are almost ludicrously complex and, for any carrier other than Sprint, completely arbitrary. Here is the North Carolina Commission's description of how the tariff works. (The discount percentages are slightly different but the growth parameters are the same as in the Tennessee tariff.)

The contract which is the subject of this filing requires the IXC to attain and maintain a 10% or greater growth in switched access minutes over a predetermined minimum usage level in order to be eligible for the maximum discount available under the contract. The larger percentage discounts are available only in the later years of the contract. If 110% of the minimum usage level is maintained in years one through five, the discount rises linearly from 15% discount in year 1 to 35% discount in year 5. No discount is provided in any year in which the switched access minutes do not exceed the minimum usage level. Lower percentage discounts are available in years 1 through 3 if the growth in

*(footnote continued on following page ...)*

growth parameters in this tariff were copied from an "SWA Contract Tariff" which BellSouth filed with the TRA in June but then withdrew after protests were filed. In its latest filing, BellSouth now admits that the earlier filing was "in practical effect, [a] contract service arrangement" between BellSouth and Sprint. BellSouth Answer, at 2.

The Authority is well aware of the multitude of legal and regulatory problems caused by BellSouth's use of Contract Service Arrangements (CSAs") in other contexts. The Tennessee Attorney General has recently advised the Authority that the agency has "the statutory duty to ensure that special contracts are allowed only when special circumstances justify a departure from the general tariffs." Furthermore, the agency, "must also ensure that any special rates is realistically and in practice made available to all customers who are similarly situated. Letter from Paul Summers to David Waddell, May 31, 2002, at p. 4. Nothing in BellSouth's proposed tariff demonstrates what "special circumstances" are present in this case to justify a departure from the general access tariffs. The mere fact that one carrier has apparently negotiated a discounted rate does not constitute sufficient reason for approval by the TRA. As the Attorney General noted, "Tennessee law does not allow a regime of special rates or discriminatory discounts negotiated by each customer having sufficient bargaining power to command special

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switched access minutes is between 102% and 110% of the minimum usage level, but no discount is available in years 4 and 5 if the usage does not exceed the minimum usage level by 10% or more. At switched access usage levels greater than the minimum usage level but below 102% of the minimum usage level, only a 7% discount is available in year 1, and no discount is available in years 2 through 5. In all cases, the discount applies only to the eligible usage in excess of the minimum usage level.

Although not specified in the tariff, the minimum usage level for this particular customer is based on the switched usage over an 18-month period prior to the agreement. This level is fixed for the life of the agreement.

The North Carolina Commission, which is apparently the only state commission to conduct a hearing on this tariff, rejected it as "biased" and "not in the public interest." A copy of the Order is attached.

treatment.” *Id.* Tennessee law, in other words, “does not allow” the type discriminatory rates BellSouth has proposed in this tariff.

Finally, as discussed in the Coalition’s Petition, this proposed tariff does not offer “volume” discounts but “growth” discounts. In other words, a smaller long distance carrier whose business is growing would qualify for the discounts but a larger carrier with flat or declining volumes would not qualify. As BellSouth has acknowledged, the FCC has raised concerns about these “growth” tariffs and has declined to approve them.

This is apparently another “first” for the Authority, which has never before been asked to consider whether a growth tariff is “just and reasonable” or even makes economic sense. As the FCC has noted, a growth tariff of the type proposed by BellSouth could also be used to give BellSouth’s new and growing long distance business an unfair advantage over other, more established carriers. Certainly, the Authority will want to weigh these concerns carefully in the context of a contested case proceeding and allow all parties the opportunity to present evidence before deciding whether this tariff makes sense for Tennessee.

### CONCLUSION


The Coalition and the Consumer Advocate have not asked the Authority to disapprove BellSouth’s tariff but only to withhold judgment until after a hearing has been conducted. Even BellSouth must concede that the idea of offering discounted access charges designed to benefit one long distance carrier over others raises unique regulatory and legal concerns. Those issues need to be fully aired in a hearing and addressed by the Authority.

For these reasons, the Coalition asks that Petition should be granted, the tariff suspended,  
and this matter set for hearing.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 14<sup>th</sup> day of October, 2002.

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